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VOL. VIII--NO. 6.

HONOLULU, WEDNESDAY, FEB. 21, 1872.

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#### Supreme Court-In Banco. JANUARY TERM, 1872.

WILLIAM H. DAVIS TO. CHARLES BREWER. In Equity. On Appeal from decision of the Chief Justice.

DECISION ON DEMURRER AND PLEA IN BAR. Bill in Equity to obtain a lot of land in Honolulu, which the respondent holds under a Royal Patent, and which the complainant claims under the following state of facts set forth in his Bill:

May 20, 1847, a deed of partition was made between Wm. H. Davis, Robert G. Davis and Elizabeth Jones, point of law, it can not conclusively be presumed the lot claimed in this suit.

June 3, 1847, the complainant, on leaving the Kingdom, appointed his brother Robert his agent by Letters of Attorney, with power to transact all | Court by personal or substituted notice, but does substitute, compromise claims, but not with express whose rights were thus apparently adjudicated, a power to sell or mortgage land, borrow money or give notes. This Letter of Attorney was recorded, and does not appear to be revoked.

Nov. 6, 1852, Land Commission Awards numbered G. Davis respectively for land included within their fraud is something which "vitiates the most denied that the appellee was the intestate's son. shares under said deed of partition. January 10, 1835, Robert G. Davis borrowed \$3000

of B. F. Angell, giving therefor his own and W. H. power of sale mortgage on the land covered by App., 206, (1867.) Wm. H. Davis' name as his attorney. Feb. 21, 1856, Angell assigned the mortgage and

Equity filed Oct. 25, 1856, and at a sale thereupon ordered by the Court, took a deed of conveyance from the Marshal, Feb. 4, 1857. March 3d, 1857, C. Brewer 2d conveyed the land to C. Brewer, 1st, by quit claim deed. Sept. 7, 1857, C. Brewer 1st took out a Royal Patent for the land described in said Award No. 4932,

note to C. Brewer, 2d, who foreclosed by Bill in

which Patent avers that the said Award had been issued to him by the Land Commission. decree for the foreclosure, the giving of the mort- both sides shall have been presented. (3.) gage deed and note, and the issuing of the Royal Patent, are all without his knowledge or authority, and that he has in no manner received any benefit

or proceeds from the sale, or on the note, and that the Patent was "wrongfully procured." The respondent demurs for non-joinder of Angell and Brewer 2nd, and pleads in bar the Royal Patent and decree for forclosure. C. C. Harris and F. H. Harris for Complainant,

S. H. Phillips and A. F. Judd for Respondent. Parties: Angell and C. Brewer 2d merely released their interest in the land, giving to their respective grantees all their knowledge of the title. It is not apparent therefore that their liability to this respondent is consequent on his where there is no ingredient of traud, but regards liability to the complainant in case his title fail; It as the sounder doctrine which remits a party to on the contrary, it would seem that the doctrine his express covenants, and gives him no right to of cureat emptor applies to the assignment of recover the purchase money on a quit claim deed in of cureat emptor applies to the assignment of the mortgage and conveyance by quit claim deed.

such cases. 2 Kent's Comm., 471. That a purchaser is bound to inquire into defects in a power of at-As joinder of these parties does not depend upon the importance of their testimony to the there is no implied covenant of title in a quit claim, respondent, for that is available for them, but on see also Rawle's Covenants of Titles, pp. 476, 473,

tions are in favor of a Patent. It is the highest | hind the Patent, and examine the Equity in the | Hill, 215; Saunders vs. Robinson, 7 Met., 314; evidence of title, and can only be impeached in | Bill." The Patent in this case was based on a Land | Freeman vs. Cooke, 2 Exch., 654; Watkins vs. Equity on a clear showing of fraud or mistake in | Warrant assigned to the Patentee by an unauthorthe issuing of it. There is no hardship in requir-ing a patential to evaluin how his Patent on its ing a patentee to explain how his Patent on its that they could look into the Equity of the title, Copeland vs. Copeland, 28 Me., 529. The foreface conflicts with an Award by the Land Com- and that it was "not an unreasonable duty to lm- going cases fully illustrate the view that no one mission, in the false averment that it is based on pose on the purchaser to examine both the Warrant is thus estopped by his own acts or words, unless a Land Award issued to him which was in fact and the will, and to see what powers it conferred he was aware of the right of which he is said to issued to another person. It is only in a judicial on the executor;" that the assignment of the War- be estopped, and that an estopped does not arise tribunal that rights appearing to be secured | rant by an executor was enough to put a prudent under one Patent, or Land Award or Statute, man on the inquiry for defects in title before purcan be adjusted with conflicting rights appearing the Court, Marshall, C. J., say, of a Land Patent by to be secured under another Patent, Award or the State of North Carolina: "But there are cases estopped requires to be considered by the jury, Statute, or under the Constitution. The Execu- in which a grant is absolutely cold, as where the who might perhaps be instructed concerning tive authority may be misled into giving to one State has no title to the thing granted." So in Bod- their conclusiveness provided thay were satisfied man a Patent of another's land, and clerical mis- ley vs. Taylor, 5 Cr., 191, and in Miller vs. Kerr, 7 of the original intent. takes are always possible, but it can not revoke | Wheeler, I, the Court held that a legal title in land its own acts, and must leave to the Courts to deet alt., 2 Haw., 239, which is a precedent govern- Orleans vs. Armas, 9 Pet., 237. ing this point in the present case. So in Lannui vs. Puchu, Ib., 161, where the defendant held a Royal Patent, alleged to have been wrongfully

This view is sustained by the decisions of the that they may be impeached collaterally." United States Supreme Court on Patents Issued

Courts on Royal Letters Patent, (2.) Conclusiveness of Judgments.-In the absence of fraud or obvious mistake apparent on the record, judgments inter partes are final on par- had himself in the subject matter of the grant, as in pellunt's witnesses to be the true father of the ties and privies, if pronounced by a Court having the case of Alton Woods, (1 Coke 43). 2. Where appellee, is ready to testify that he is not the errors and irregularities in the proceedings on injustice, or at all event great inconvenience. Such which such judgments are based can usually be was the case of Alcock vs. Cook, (5 Bing. 346,) or a which such judgments are based can usually be when the King has been deceived in the considerareversed only on motions for new trial, bills of tion expressed in the grant, as where the considera- certain concerning this testimony, but in view of a voidable judgment and a void judgment. The really is, or where as in the case of Mend vs. Southjudgment of a Court having no jurisdiction is well, (2 Roll. Abr. 189) the King recites a former the Court by actual or substituted notice. It is has not been surrendered. Here the grant would be competent for the Legislature to provide a ren- void because there was no such consideration as was sonable mode of substituted notice to defendants recited. cial proceedings had after such statutory notice sufficient notice.

The complainant avers that he had no knowl- by deciding that he had it." edge of the proceedings had against him. There In Elliott vs. Piersol, 1 Peters 350, the Court say is nothing judicially before us concerning the that if a Court "net without authority, its judgcharacter of the citation, or to show that there was any citation. The Statute in force at that Cargo, Freight and Treasure, from Honolulu on the premises involved in the controversy," and by publication "in the Polynesian newspaper for such period as the Court may deem to be wrongful sale by an unauthorized agent, notice to him of proceedings in court to decree the sale process void. One case is the fault of the party absolute by foreclosure, or notice thereof to the misself, the other is considered the error of the are as follows, viz: person placed on the premises, placed there by Court." sentee, for his rights ought not to be concluded because they had jurisdiction."

ception, and so appearing on the showing of the cause, and therefore the whole world is bound by party seeking the aid of the Court to sanction it. the decision. The reason on which this dictum In the absence of apparent fraud or mistake in the basis or concection of the decree per- and it is a principle of natural justice, of universa haps the safer doctrine to hold concerning obligation, that before the rights of an individual

judgments of Courts of general jurisdiction is, that the recital in the record of facts giving either actual or implied, of the proceedings against jurisdiction is conclusive, and even that in the him," and generally. See Crepps vs. Durden, 1 Sm. silence of the record, the existence of those Leading Cases, Hare & Wallace's Notes. facts will conclusively be presumed. But whatever be the sound doctrine on this very unsettled of certain land which they inherited, which includes | that a party was amenable to the jurisdiction of the Court when not only does the record fail to show or aver that he was brought before the business appertaining to his private estate in the show an apparent failure of authority in the basis tate's estate was granted by the Probate Court in Hawaiian Islands, to lease land, procedute and of the entire proceedings. When an allegation Honolulu to the appellant's parents, Kalawa and defend suits, substantiate land claims, appoint a is made that there was a fraud on the absentee person may show it be can that the apparent the intestate, on the festimony of the said Kalawa fraud was real, without impeaching the validity or | and others to that effect. In June, 1871, on petition conclusiveness of the judgment within the mean- by the appellee for final distribution of the catate, 4031 and 4032 were issued to Wm. H. and Robert ing of the above rule, for, as Lord Coke says, the appellant claimed to be heir as next of kin, and solemn judicial proceedings, ecclesiastical or temporal." But it must be a clear and apparent of the probate proceedings of 1852 was submitted

note and mortgage with his own name and with dence, the doctrine is not impugned that in order to obtain a reversal of the decree for foreclosure, he must affirmatively make out a case of wilful fraud, or mistake, in which do not enter his own acts or failure to act in duly ascertaining the conduct of his agent, the condition of his property, or his culpable failure to obtain notice of what a reasonably prudent man should have known, and also that he has received no benefit from his after they were brought to his notice. These are

(1.) In Burlingame vs. Hobbs, 12 Gray, 263, there ther, for whose benefit the plaintiff had mortgaged other matters not then requiring adjudication, as on the ground that the person sought to be made a would have no conclusive effect. In appointing party "has no interest whatever in the subject matter of the present suit. However it is determined, he will neither gain nor lose." In Earle vs. Bickford, 6 Allen, 550, the Court say:

consideration money in case of fallure of title," And so in Earle vs. De Witt, Ib., 634, (Merrick, J. dissenting,) where there was a mutual mistake us to the title. Kent admits that the law does not seem to be clearly and precisely settled on this point, torney under which a mortgage is made, and that the question of their possible liability to him should the title fail which they undertook to convey, their non-joinder is not regarded as good (2.) In Brush vs. Ware, 10 Fet., 100, the Court held under United States Land Patent, the Court there, McLean, J., say: "The question which should Conclusiveness of Patents: All the presump- first be considered is whether the Court can go be- Hathaway, 8 Wend., 480; Dozell vs. Odell, 3 could not "be made to yield to an equity founded in the mistake of a ministerial officer," in issuing a

or the issuing of them was without authority, or was prohibited by Statute, or the State had no title,

the decisions of the Courts very uniformly agree has been held to be avoided by reason of any mis- of the motion in arrest is accordingly overruled. description or mistake therein, will be found to fall under one of three classes; 1. When the King by jurisdiction of the cause, the subject matter and the King has already granted the same estate to an- father, and that this evidence was not discovered the person sought to be affected thereby, and other, in which case the second grant would work corum non justice, and void, and can not affect grant of an office for life and a surrender, and then grants the same office to J. S., whereas in truth the a person not brought within the jurisdiction of King has not granted the office for life or the office

who have left the Kingdom, and ordinarily, judi- (3.) In Sibley vs. Waffle, 15 N. Y. 190, an Administrator's sale of land was made by order of the Court, but the order was made without any jurisdiction uncan not be declared invalid on the ground of insaying that a judge "could not acquire jurisdiction

constitute no justification." Corwithe vs. Griffing, 21 Barb. 15: If the defect time required notice to be given to "some one of jurisdiction is apparent in the record, the judgment may be inquired into by a Court of Equity. Woodcock vs. Bennett, 1 Cow. 735: Per Cur: "But there is a marked distinction between judgequitable." But in the case of a fraudulent or ments reversed from error, and executions set aside for irregularity. In the latter case the party is nev-

person placed on the premises, placed there by such agent, who was in this case authorized to lease, would not be the kind of substituted notice intended by the Statute; for that would be statute; for that would be substituted notice intended by the Statute in the substitute in the using the Statutes and the Courts as instruments | Bodurtha vs. Goodrich, 8 Gray 511, where the Court | or lip, or destroy or disable any limb, member or to effectuate an apparent fraud, and to validate (Shaw C. J.) say: "It would be reasoning in a cir- bodily organ of another, shall be punished by a an instrument prima facie worthless. And the cle and inconclusive to say that the Court had juris- fine not exceeding one thousand dellars, and imsame might be said of a publication if it were diction because it was shown by their record that prisonment at hard labor not exceeding ten not at least likely or possible to reach the abhad authority to make such record binding on him,

heard, in a transaction which was void in its in- whole world it is said are parties in an Admiralty person in any of the ways mentioned in the pre-

\$6.00 PER YEAR.

stands will determine its extent; but notice of the controversy is necessary in order to become a party, be bound by a judicial sentence, he shall have notice,

Supreme Court-In Banco. JANUARY TERM, 1872.

KAUHI, Appellant, vs. KEONI LIAIKULANI, In the Estate of Liaikulani, deceased intestate. In November, 1853, administration on the intes-Mahiai, the latter of whom was the intestate's sister and died in 1862. They were also appointed guardlans of the appellee as the supposed son and heir of The Court decreed in favor of the appellee, but the jury on appeal found for the appellant. The record Davis' joint and several promissory note, with a case of fraud. See Patch vs. Ward, 3 Eng. Ch. to the jury, the Court declining to raie that they were conclusive on the appellant's rights. The apsaid Award No. 4002. Robert 6. Davis signed both In permitting the complainant to offer his evi- pelice moved in arrest of judgment on the ground that the appellant is estopped by this record from denying that he is the intestate's son; and also moved for a new trial on the ground of newly discovered evidence. Exceptions were taken to the

denial of these motions. A. F. Judd for the Appellant. W. C. Jones for the Appellee.

HARTWELL, J. : The decree of a court of competent jurisdiction is generally conclusive in matters which agent's acts, nor impliedly ratified them by silence, required to be adjudicated as a basis for the decree. In granting administration, the intestacy The complainant avers that the proceedings in the matters for consideration after the testimony on of the decedent requires to be determined, and that fact when so determined should not afterwards be questioned by parties to the proceedwas a demurrer for non-joinder of the plaintiff's bro- ings. But if the Court should go on to decide certain land, but the Court over-ruled the demurrer | for instance who the heirs are, such adjudications a guardian, the Court has only to find prima facie cause for such appointment. But that in any ex parts or preliminary proceedings in pro-"The general doctrine is that the grantee who takes bate, there is a final adjudication of heirship, such a deed (quit claim,) can not recover back the kindred or legitimacy of birth or marriage, is more than can be admitted. Such questions are always open on hearings for final distribution. There is then no formal adjudication which is conclusive on the status of the appellee.

But a party may preclude himself from denying what he has once asserted to be true, on the principle of equitable estoppel, whereby a man can take no advantage from his own wrong. In order that the representation or act of a party shall operate an estoppel, it must be clear that it was made advisedly, or at least "negligently in disregard of the rights of others who are reasonably authorized to rely upon them." Per Bayley, J. Heane vs. Rogers, 9 B. &. C., 577. The intention to influence another and the influence must be made clear. Welland Canal vs. Peck, 13 N. H., 360; Thayer vs. Bacon, 3 Allen, 164; Burker vs. Binninger, 14 N. Y., 270; from acts or words of which the meaning and significance are doubtful. The very doubt concerning the meaning of the acts alleged as an

The appellant's parents thought that the appellee was the intestate's son and heir, and they cide on their validity and effect. This was so land warrant. So in Bouldin's Massic's Heirs, Ib., took the appointment as his guardians on the decided by this Court in Bishop vs. Namakalan 147; Hoofnagle vs. Anderson, 16., 212; City of New strength of this belief. But by native customs and ideas concerning adopted children, they The People vs. Livingston, 8 Bart., 277, For Cur.: would have taken the same course if the appellee "If letters patent are absolutely void on their face, were merely adopted as a son and heir, as if he had been the child of the blood. We can not say then, that the appellant's parents have thereby estopped him from showing the truth in In Gladstone vs. Earl of Sandwich, 4 M. & G. 1020, the matter, although the record is strong eviby the Executive authority, and of the English | it is said that the cases in which the King's grant | dence against him. The exception to the denial

The affidavit of newly discovered and material grant has professed to give a greater estate than he evidence shows that Kauhi, alleged by the apnotil after the trial. That this is new and material evidence, must be admitted. It is not clear that the appellee used due diligence to as- lost ring to his memory, and so he wrote to his exceptions, writs of error or other defined stat- tion has been untruly stated, or the subject of the the great conflict of evidence in the case, the and if she had found the ring. In 1870 he received utory modes. But there is a distinction between grant has been recited to be of less value than it doubt about the exercise of proper diligence may be given in favor of the appellee, and a new trial

Supreme Court-In Banco.

JANUART TRRM, 1872. THE KING to. JOHN JONES.

QUESTION RESERVED. The defendant was indicted for an assault with a oaffed platol, with "intent to murder, main and disfigure." The counsel moved in arrest of judgment on the ground that the indictment was defective: 1, in failing to specify any statutory offence, us it neither avers that the assault was made by one. "being armed with a dangerous wespon," ner does it aver any of the modes enumerated in the Statute, ments and orders are regarded as nullities. They Sect. 3, Ch. 9, Comp. Penal Code; and, 2, in charging two distinct offences in the words assault with intent to "murder, maim and disfigure." Judgment was pronounced on the verdict, subject to the opinion of this Court in Banco, on the question thus

> Attorney-General S. H. Phillips, for the Crown. W. C. Jones for the Defendant. HARTWELL, J. : The Statutory provisions affecting this case

Sucr. 4. "Whoever shall assault another with without a possible opportunity for him to be The Mary, 9 Co. 145, per Marshal C. J.: "The intent to murder, or to maim or disfigure his

### Hawaiian Gazette

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ceding Section, shall be judged guilty of assemble in the first degree, and shall be punished by a fine not exceeding one thousand dollars, and imprisonment not more than five years."

Szur. 5. "Whoever, being armed with a dangerous weapon, shall asmult another with intent to commit burgiary, robbery, manslaughter or murder, or other crime of such character, shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor not more than ten years."

If an indictment be founded on an assault being armed with a dangerous weapon, these words should be set forth, for the Court can not infer that the instrument alleged to be used in the assault is a dangerous weapon with which the defendant was armed. A loaded pistol may or may not be a dangerous weapon according as it is loaded with ball or blank cartridge. An assault with a stick may be an assault with a dangerous weapon, but if so intended should be arerred, in order that the record may show the precise mature of the offence.

It would be sufficient to allege an assault with intent to murder, for this makes the statutory offence complete, but it is not sufficient to allege an assault with intent to main and disfigure nnless some of the modes enumerated in the Statute be also averred, for otherwise the record does not show the statutory offence. The words in the third section cited are not merely illustrative of a common law offence, but are descriptive, and therefore essential to be averred as constituents of the statutory offence.

As two distinct acts are characterized as an offence in the fourth section, viz : an assault with intent to murder, and an assault with intent to maim, &c., each being in itself a complete offence. they ought not to be joined in the same count of an indictment. We think this is no more than is required by the rules of criminal pleading, and that a departure from these rules can not be allowed consistently with the constitutional right of detendants to be tried only on "a good and sufficient indictment, fully and plainly describing the offence."

The judgment against the defendant is therefore reversed, the verdict set aside, and he may take judgment.

AN INCIDENT IN FIRE'S LAFE. - James Fisk, Jr., conceived and executed a brilliant stroke at the close of the late war between the States, the particulars of which have never yet been published. With that sagacity which distinguished him in all his career, Fisk saw that when, on the 2d of April, 1865, General Lee was driven from Petersburg, his surrender could not be far distant. He immediately went to Boston, consulted some of his financial friends, and made them partners in his scheme. This was to get the news of the surrender of Lee and collapse of the Confederacy for use on 'Change in London in advance of the nmil. It will be remembered that the Atlantic cable was not then laid. A small, swift steamer, formerly a blockade runner, was purchased, fitted out and sent to Halifax in ballast. Neither the captain nor officers of the steamer knew her destination. The secret of her mission was confided solely to an agent of Fisk, who was the only passenger on board the vessel. Steam was kept up night and day, and everything was in readiness for a start across the Atlantic. Days went by and still the steamer lay quietly in the harbor of Halifax, awaiting the expected message from Fisk. At length it came. If James Fisk, Jr., had tried his best he could not have indicted a shorter dispatch. It was dated at Boston, signed Fisk, and contained but one word- Go." The blockade runner started for Quecostown immediately, and got there two days ahead of the mail steamer. The agent speeded across Ireland to London, and commenced his operations. Before twenty-four hours elapsed he sold "short," (that is, sold what he had not got.) \$5,000,000 in Confederate bonds. He had orders from Fisk to sell as long as he could get buyers, but was restrained by a partner of one of the Boston men, who was cursed with prudence. But the operation was pretty successful; the "Syndicate," as the story goes, divided between \$3,000,000 and \$4,000,000. the proceeds of the "speculation." This was a

lift for James Fisk, Jr., which was very welcome. THE ROMANCE OF A RING !- A romantic story comes from Kansas City, Missouri, and like many others, its incidents have grown out of the war. In 1861 a young man of Kansas City callsted in the Confederate service, receiving as a parting gift from his mother a plain gold ring. In 1864 the young man was taken ill at Clarksville, Texas, and during his delirium lost this ring. After a fruitless scarch, he gave up all hopes of ever seeing it sgals, and when sufficiently recovered to leave the place he remaked to his nurse, a "pretty and amiable girl," that if she would find his ring he would come back and marry hor. At the close of the war he returned home, where the loss of his mother recalled the former purse in 1860, asking if she was still single an answer from the malden, saying that she was still single, and that only five days before, in the course of some repairs to the house, the ring had been found. The denouement can, of course, be easily guessed. A new offer of marriage was made and accepted, and with money in his pocket and a good home behind, the man has just gone to Texas to bring back his "bonnie bride."

THE LOVING CUP.-The Journal des Debats given the following description of the ceremony of passing round the loving cup, at the Manalon House, London: "The loving-cup is a great golden wase with a cover, and filled with a mixture of champagne, claret, and spices. The Lady Mayoress turned to the left side, holding the cup with her two hands. M. Leon Say raised the cover while she drank. He then took the cup in his turn, and turning to the left, received from his neighbor the same services while drinking. The round of the table was thus made, smid the grave salutations of those passing the cup. The ancient usage wills that three persons be always standing at the same time—the one who drinds, the one who holds the cover, and the one who is to hold the cover next. It appears that the office of the third person standing is to watch over the two others, that they may not be knocked on the head while they are drinking."

A LIBEL SUIT for \$30,000 damages has been brought against Horace Greeley by Dr. William Paine, Dean of the Philadelphia Medical University, for some Tribune articles charging that institution with sell-

ing diplomas to a negro and an herb doctor. THE Empress of Germany has given one thousand thalers to the society started in Berlin to devise original German fashions. The purpose of this society is to establish a modest and uniform style of

IT is now said that Rochefort will be confined in the Island of Saints Marguerite, on the coast of Provence, and that he is to occupy the cell in which the Man in the Iron Mask was imprisoned several